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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Amendment of the Commission's Rules)
To Establish New Personal Communications)
Services, Narrowband PCS)

GEN Docket No. 90-314
ET Docket No. 92-100

Implementation of Section 309(j) of the)
Communications Act — Competitive Bidding,)
Narrowband PCS)

PP Docket No. 93-253

REPLY COMMENTS OF
THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

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**REPLY COMMENTS OF
THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION**

The Personal Communications Industry Association ("PCIA"), by its attorneys, respectfully submits its reply to the comments on the Further Notice of Proposed Rulemaking in the above-captioned docket.¹ The record in this proceeding demonstrates substantial consensus that the Commission's proposals must undergo major modifications, consistent with the proposals made by PCIA in its opening comments, in order successfully to foster the development of the wide variety of narrowband services necessary to serve the American public in the most effective manner.

¹ *Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS*, FCC 97-140 (Apr. 23, 1997) (Report and Order and Further Notice of Proposed Rulemaking) ("*Second Report and Order*" and "*Further Notice*"). By an *Order* adopted June 23, 1997 (DA 97-1316), the Commission granted PCIA's Motion for Extension of Time, and extended the reply comment deadline until July 21, 1997.

I. INTRODUCTION AND SUMMARY

In its opening round comments, PCIA generally supported the Commission's overarching goal of creating a competitive market for narrowband personal communications services ("PCS"), but noted that a number of the Commission's proposals would have to be substantially modified in order to achieve this goal. A number of the recommendations made by PCIA received substantial support from the commenting parties, with only limited opposition to the revisions suggested by PCIA to the proposals contained in the *Further Notice*.

First, the Commission should not adopt a "substantial service" option for complying with the construction obligations of narrowband PCS licenses. Instead, the Commission should retain its existing buildout schedule with one modification: it should toll the beginning of the five-year buildout period until the date the last market area license in the original two MHz of spectrum is issued.

Second, the Commission should not release the one MHz of reserve narrowband PCS spectrum at this time, nor make any decisions concerning the channelization of other technical specifications. To do so would be deleterious to the public interest. Instead, PCIA reiterates its commitment to complete a study of spectrum needs that will assist the Commission in making a more fully informed decision concerning the handling of the reserve spectrum.

Third, the Commission should retain its current eligibility requirements for the response channels — only current paging licenses should be permitted to apply to hold authorizations for the response channels. The Commission also should not alter the limitation on the use of the frequencies for mobile-to-base transmissions in order to avoid unacceptable interference problems.

Fourth, the competitive bidding rules contemplated for the narrowband PCS auction should be modified in several significant respects. Narrowband PCS auction participants should be required to identify each frequency in each market on which they intend to bid, and to submit upfront payments calculated on a per market, per frequency basis. The Commission also should provide auction participants with complete information during the auction, including the identity of competing bidders. Also, the Commission should define a safe harbor from its anti-collusion rules for carriers that are negotiating mergers or other inter-carrier agreements during the course of the auction.

Finally, the Commission should permit partitioning of the narrowband PCS service areas, but only subject to safeguards to prevent abuses of the Commission's construction requirements.

II. THERE WAS STRONG OPPOSITION TO THE "SUBSTANTIAL SERVICE" OPTION AND SUPPORT FOR A MODIFIED VERSION OF THE COMMISSION'S CURRENT BUILDOUT SCHEDULE

In its opening round comments, PCIA opposed allowing licensees to meet their construction obligations by providing "substantial service" to the public because such an unascertainable buildout requirement would encourage speculators to participate in the auctions, provide business for the unscrupulous operators of application mills, encourage litigation between licensees and the Commission, and ultimately delay substantially the rollout of new narrowband services.² PCIA therefore requested that the Commission retain its current buildout schedule in a slightly modified form under which the clock on the five-year construction

² PCIA Comments at 13-14.

requirement would not begin to run until the date the last market area license in the original two MHz of narrowband PCS spectrum is issued.

There was widespread agreement that the "substantial service" option is inappropriate for narrowband PCS. Parties opposed to this option noted that it would encourage spectrum warehousing, in violation of Section 309(j)(4)(B)'s command that the auction process be designed to promote the rapid commencement of service to the public.³ Other commenters stated that determining the meaning of a vague term such as "substantial service" on a case-by-case basis would be extremely burdensome for the Commission, and, ultimately, the courts.⁴ The resulting litigation will only hinder the provision of service to the public, contrary to the Commission's goals.

Only one party supported adoption of the "substantial service" option, stating that buildout requirements were counterproductive and unnecessary because it is unclear if, and when, narrowband PCS will gain public acceptance, and the investment of millions of dollars in license fees is a sufficient incentive for narrowband PCS licensees to implement service.⁵ This position is at odds with both market realities and the Commission's statutory mandate to ensure service to the public.

First, there is no reason to assume that the American public does not want access to a greater variety of two-way messaging services, such as might be provided over narrowband PCS

³ See, e.g., Arch Communications Group, Inc. ("Arch") Comments at 6-7, 17; Benbow PCS Ventures, Inc. ("Benbow") Comments at 13-14; Merlin Telecom, Inc. ("Merlin") Comments at 6-7; PageMart, Inc. ("PageMart") Comments at 6-7.

⁴ Paging Network, Inc. ("PageNet") Comments at 12-15; PageMart Comments at 7.

⁵ Ameritech Mobile Services, Inc. ("Ameritech") Comments at 2-3.

spectrum. At present, the messaging industry is robustly competitive, and enjoys strong demand for services. There is every indication that two-way messaging will enjoy the same high level of demand. Thus, the Commission should not presuppose that the new services offered under the rubric of narrowband PCS will be a commercial failure.

Second, it is legally irrelevant whether the money expended at auction will provide licensees with sufficient incentive to construct their networks. As pointed out by a number of commenters in this proceeding,⁶ as part of its auction authority, the Commission was given a statutory mandate under Section 309(j)(4)(B) to "include performance requirements, such as appropriate deadlines and penalties for performance failures ... to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services." This statutory section succinctly refutes any contention that Congress intended a licensee's auction payment — in and of itself — to ensure network buildout.

Finally, there was support for PCIA's proposed modified construction schedule. Adoption of the PCIA recommendation takes into account the equipment realities confronting existing narrowband PCS licensees as well as the marketplace and financial conditions. For example, CONXUS stated that the five-year buildout deadline should be tolled until the date the last market area license is issued because manufacturers of narrowband PCS equipment have not been able to provide carriers with the equipment necessary to construct their networks on a

⁶ See, e.g., Arch Comments at 6-7, 17; Benbow Comments at 13-14; Merlin Comments at 6-7; PageMart Comments at 6-7.

timely basis.⁷ Similarly, Arch stated that allotting additional time to construct the networks is warranted given the delays encountered by carriers in obtaining the appropriate equipment.⁸

Thus, the Commission should retain the current buildout schedule for various categories of narrowband PCS licenses, except it should toll the beginning of the five-year buildout period until the date the last market area license in the original two MHz of narrowband PCS spectrum is issued. The ten-year construction date would continue to be measured from the date any particular license was or is granted. This approach balances the real world conditions in which narrowband PCS licensees have sought to construct their initial systems with the goal of ensuring that the spectrum is used to meet public needs for narrowband services.

III. THE VAST MAJORITY OF COMMENTERS OPPOSED ANY PLAN TO IMMEDIATELY RELEASE THE ONE MHZ OF RESERVE SPECTRUM

PCIA demonstrated in its initial comments that it is premature at this time to channelize and license the one MHz of reserve spectrum because: (1) given that narrowband PCS licensees are just now building out their networks, it is unclear what are the future spectrum needs of this industry; (2) the premature release of the reserve spectrum may lead to decreased investor confidence in the ability of licensees to execute their business plans; and (3) an oversupply or inappropriate channelization of spectrum will increase the probability of inefficient spectrum usage. Given these facts, PCIA offered to coordinate an industry wide narrowband PCS spectrum needs study, and report the results to the Commission by June 30, 1998. With this

⁷ CONXUS Comments at 13-14.

⁸ Arch Comments at 17-18.

information in hand, the Commission can make a better informed decision as to the release of the reserve spectrum as well as appropriate channelization and technical requirements.

PCIA's position garnered widespread support. Those opposing any immediate reserve spectrum reallocation pointed to a number of public interest factors that supported their position. First, given the still embryonic nature of narrowband PCS, it is impossible to determine how its service offerings will develop, what types of applications the market will and will not support, and, as a result, the most effective way to channelize and license the remaining one MHz of spectrum.⁹ Second, there will be further technological advances resulting in new, innovative, and unforeseen messaging services for which spectrum should be reserved.¹⁰ Third, the release of more spectrum — before there is a demonstrated demand for new licenses — may diminish stock valuations, thereby making it more difficult for existing licensees to raise sufficient cost-effective capital to meet construction and coverage requirements.¹¹ Fourth, the Commission has taken a number of actions in recent years to increase the supply of messaging spectrum.¹² Finally, an auction of the reserve narrowband PCS spectrum in the near future is unlikely to raise the

⁹ Motorola, Inc. ("Motorola") Comments at 7; Benbow Comments at 5-8; Celpage Inc. ("Celpage") Comments at 7-9; Metrocall, Inc. ("Metrocall") Comments at 6-7; PageNet Comments at 4-11.

¹⁰ AirTouch Paging ("AirTouch") Comments at 18-20; PageMart Comments at 4-6.

¹¹ Morgan Stanley Partnerships ("Morgan Stanley") Comments 4-6; Ameritech Comments at 7; CONXUS Comments at 16.

¹² AirTouch Comments at 14-18 (noting that: (1) 929 MHz PCP operators can now earn channel exclusivity; (2) in 1995, the FCC auctioned 1,020 licenses to provide 900 MHz SMR services in 51 MTAs; (3) the Commission has enacted flexible use rules to allow cellular, broadband PCS, IVDS, and other licensees to provide paging services; and (4) paging is now licensed on a market area basis).

substantial sums that may be realized if it were held at a later date, when the actual value of fully operational systems will be evident.¹³

Two parties fell outside of the mainstream on the issue of spectrum reallocation, and argued that the Commission should proceed at present to allocate and auction the reserve spectrum. These entities argued that: holding the spectrum in reserve does not encourage the provision of additional telecommunications service to the public;¹⁴ making more spectrum available now will increase the entry opportunities for new businesses;¹⁵ and conducting a single auction in which all narrowband PCS spectrum is available will reduce the overhead of participating in an auction.¹⁶

None of these arguments withstands close scrutiny. First, there is no record evidence that holding one MHz of narrowband PCS spectrum in reserve will have any effect on the provision of service to the public. As other commenters have pointed out, in the past few years, the Commission has taken a number of steps to increase the amount of spectrum available for messaging uses, thereby alleviating any potential shortage, at least for the present.¹⁷ In addition, most narrowband PCS licensees are just now rolling out their service offerings, and are unsure what additional spectrum, and under what channelizations and technical terms, is necessary to

¹³ Morgan Stanley Comments 4-6; PageMart Comments at 4-6.

¹⁴ Merlin Comments at 5; Rural Telecommunications Group ("RTG") Comments at 21.

¹⁵ Merlin Comments at 5.

¹⁶ RTG Comments at 21.

¹⁷ AirTouch Comments at 14-18.

satisfy the needs of the public. Therefore, it is unlikely that the release of additional spectrum at this time will provide the public with more service offerings.

Second, there is no reason to believe that the cost of narrowband licenses is beyond the reach of any small business that is sufficiently capitalized to construct a narrowband network once it has purchased its license at auction. Because narrowband PCS is "less capital intensive than broadband PCS,"¹⁸ small businesses should be able to enter this industry regardless of whether the price of a license at auction is marginally reduced by the release of the reserve spectrum. What the Commission does not want to do — and what it might do by flooding the current market with spectrum — is to encourage under-capitalized entities to purchase narrowband PCS licenses, and then default on their construction obligations.

Third, it is likely that every business entity — both large and small — would agree that participation in a spectrum auction is an expensive proposition, when legal fees and additional staffing needs are taken into account.¹⁹ The issue of auction streamlining is, however, better left to other proceedings. In the case of narrowband PCS, the disadvantages of releasing the reserve spectrum at this time, as detailed above, far outweigh any modest cost savings that might result from such a decision.

Finally, a number of parties seconded PCIA's suggestion that, prior to taking any action on licensing the reserve spectrum, the Commission should authorize a comprehensive survey of the industry's spectrum needs.²⁰ The comments in this proceeding underscore the desirability of

¹⁸ *Second Report and Order*, ¶ 19.

¹⁹ RTG Comments at 21.

²⁰ CONXUS Comments at 16; American Paging, Inc. ("API") Comments at 2-3, 5.

this study, which will provide the Commission with the objective data necessary to evaluate the aforementioned conflicting claims that are being made regarding the industry's spectrum needs and the advantages and disadvantages of auctioning the reserve spectrum.

In this regard, PCIA's Paging and Narrowband PCS Alliance Council recently delegated to its Technical Committee the task of identifying the factors that need to be examined as part of the study. PCIA currently expects that the factors to be addressed by the study will include: the current and near term availability of network and user equipment, as well as the nature of equipment under development; current and innovative narrowband PCS technologies; customer demand for service offerings; interference considerations; appropriate channelization plans; financial conditions; and the appropriateness of revising the applicable spectrum cap. PCIA welcomes input from the Commission as well as other interested parties in identifying relevant factors to be studied as well as the appropriate methodologies to be employed.

IV. THE RECORD SUPPORTS LIMITING ELIGIBILITY FOR RESPONSE CHANNELS TO EXISTING PAGING LICENSEES FOR SOLELY MOBILE-TO-BASE TRANSMISSIONS

In its opening round comments, PCIA suggested that, in order to provide existing one-way paging licensees with an opportunity to compete with the new narrowband PCS licensees, the Commission should continue to reserve the paging response channels for these incumbent licensees and should continue to limit the use of these channels to mobile-to-base transmissions. By retaining the reservation of these channels for use by incumbent licensees for mobile-to-base transmissions, the Commission will create a regulatory framework that allows one-way paging licensees to transform their systems into two-way networks, thereby remaining competitive with narrowband PCS licensees.

Most commenters supported PCIA's suggested limitation on eligibility for response channels. In addition to agreeing with PCIA that this policy will promote full and fair competition between narrowband PCS licensees and paging licensees,²¹ these parties added that elimination of the eligibility restrictions would create an invitation to speculators to bid on the unpaired channels in the hopes of later selling them to paging carriers²² and would be unfair to incumbent paging licensees, many of which bowed out of previous narrowband auctions in reliance on the FCC's promise to make the response channels available to these incumbents.²³

Among those parties commenting on the issue, there was also unanimous support for limiting the use of these response channels to mobile-to-base transmissions. For example, Motorola, the only equipment manufacturer to participate in the opening round of this proceeding, stated that allowing base-to-mobile transmissions on response channels would result in increased interference to mobile-to-base transmissions because base transmitters typically use high duty cycles and greater antenna heights.²⁴ Arch added that this possibility of harmful interference is increased by the fact that receivers are typically collocated with transmitters at base station facilities.²⁵

²¹ Ameritech Comments at 8-9; Arch Comments at 6, 12; PageNet Comments at 22.

²² Ameritech Comments at 8.

²³ Celpage Comments at 12-13; Metrocall Comments at 9-10.

²⁴ Motorola Comments at 8-9. *See also* Benbow Comments at 13 (allowing response channels to be used for transmitting will cause unacceptable interference).

²⁵ Arch Comments at 6, 11.

A couple of commenters, however, favored lifting the eligibility restrictions on applying for paging response channels. These parties argued that removal of eligibility restrictions will: ensure that licenses for these channels are awarded to the entities that most highly value them;²⁶ encourage market entry into narrowband PCS;²⁷ and give licensees increased flexibility to provide new services.²⁸

None of these arguments provides a sufficient rationale for allowing entities other than paging licensees to bid on the paging response channels. In the abstract, most economic theorists would agree that one of the purposes of auctions is to award a commodity to the entity that values it most highly, and that the more entities participating in an auction, the higher the bidding will be. Similarly, it is logical to assume that allowing more entities to bid on a particular raw material (*e.g.*, narrowband PCS spectrum) will "encourage market entry" for suppliers of finished products using that raw material (*e.g.*, narrowband PCS services).

Under the particular factual circumstances surrounding the paging response channels at issue, however, these general, abstract theories are outweighed by specific policy considerations. Thus, while an open auction will increase the number of bidders, and therefore the price for which the response channels are sold, the American public will be better served by giving incumbent paging providers access to the spectrum they need in order to provide two-way services in competition with narrowband PCS providers. In addition, as described above, there is no evidence that a spectrum shortage is in any way limiting the types of services that are being

²⁶ Merlin Comments at 6.

²⁷ Merlin Comments at 6; RTG Comments at 21.

²⁸ Merlin Comments at 6.

offered or proposed by narrowband licensees. Finally, significant interference considerations dictate limits on the use of the response channels. These concrete factors, rather than abstract theory, should convince the Commission to limit the eligibility for paging response channels in incumbent paging licensees.

V. THERE IS SUPPORT FOR MODIFYING THE NARROWBAND PCS AUCTION RULES TO ENHANCE THE OPERATION OF THE COMPETITIVE BIDDING AND LICENSING PROCESS

PCIA suggested that the Commission modify its rules in three significant respects in order to improve the functioning and fairness of the narrowband PCS auction. These recommendations enjoyed support — and received no opposition — from other commenting parties. Because these modifications would promote the successful operation of the competitive bidding process consistent with the public interest, they should be incorporated into the Commission's final narrowband rules.

First, narrowband PCS auction participants should be required to identify each frequency in each market on which they intend to bid, and to submit upfront payments calculated on a per market, per frequency basis. This requirement, if properly structured, will help to weed out speculators and application mills while not placing undue burdens on legitimate applicants.

Second, the Commission should provide auction participants with complete information during an auction, including the identity of competing bidders. This free flow of information will facilitate the efficient conduct of auctions, allow bidders to avoid violations of the anti-

collusion rules, and make it easier for licensees to develop plans to avoid interference in boundary areas.²⁹

Third, the Commission should create a safe harbor from its anti-collusion rules for carriers that are negotiating mergers or other inter-carrier agreements during the course of the auction. This rule modification will allow the Commission to distinguish between collusive behavior, which should be censured, and legitimate consolidations and business transactions, which should be encouraged.³⁰

VI. THERE IS VIRTUALLY UNANIMOUS AGREEMENT THAT GEOGRAPHIC PARTITIONING IS IN THE PUBLIC INTEREST

Virtually all of the commenters in this proceeding joined PCIA in supporting the Commission's proposal to allow the geographic partitioning of narrowband spectrum. Parties supporting the implementation of geographic partitioning noted that it would allow licensees to conform their service areas to better suit their business plans,³¹ promote small business entry into telecommunications,³² and provide service to rural areas in a more timely fashion.³³ Because the

²⁹ See, e.g., PageMart Comments at 8 (the FCC should provide complete bidding information, including the identity of competing bidders); PageNet Comments at 23-24.

³⁰ See PageMart Comments at 9 (in order to deter the creation of beneficial business combinations, the FCC should develop a safe harbor from its anti-collusion rules for carriers engaged in acquisition negotiations or inter-carrier agreements).

³¹ Ameritech Comments at 8.

³² Celpage Comments at 13.

³³ RTG Comments at 21-23.

partitioning proposal received such strong support and engendered no opposition, narrowband licensees should be permitted to partition their licenses.

The record also reflects, however, that safeguards are necessary to prevent sham partitioning transactions designed to evade the Commission's construction requirements.³⁴

Accordingly, PCIA reiterates its request that in promulgating its partitioning rules, the Commission take whatever steps are necessary to prevent these possible abuses.

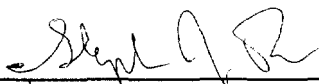
³⁴ PageMart Comments at 8; RTG Comments at 21-23.

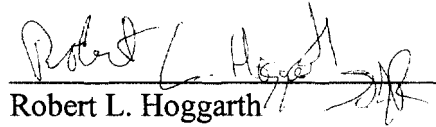
VII. CONCLUSION

The record in this proceeding demonstrates that modification of the Commission's proposed narrowband PCS rules is in the public interest. Adoption of final rules consistent with the positions set forth in PCIA's opening comments and this reply will promote the creation of a set of rules governing narrowband PCS that encourages providers to use spectrum efficiently while offering a wide variety of narrowband services to the public.

Respectfully submitted,

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